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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 GUSTAVO RAMIREZ,

12 Plaintiff,

13 vs.

13 GEORGE GIURBINO; LARRY
14 SMALLS; S. SILVA; E. DUARTE; M.
15 TAMAYO; J. ZINNA; J. MORENO,

15 Defendants.

CASE NO. 10cv1292-WQH-AJB

ORDER

16 HAYES, Judge:

17 The matters before the Court are the Motion to Dismiss the First Amended Complaint
18 (ECF No. 15), and the Motion for Leave to Amend the First Amended Complaint (ECF No.
19 16).

20 **BACKGROUND**

21 On July 19, 2010, Plaintiff, a prisoner proceeding pro se and in forma pauperis, filed
22 a First Amended Complaint pursuant to the Civil Rights Act, 42 U.S.C. § 1983. (ECF No. 4).

23 On August 23, 2010, the Court issued an Order directing the United States Marshal to
24 serve the First Amended Complaint upon Defendants. (ECF No. 5).

25 On October 19, 2010, the Marshal filed waivers of service as to Defendants Smalls,
26 Silva, Duarte and Tamayo. (ECF Nos. 8-11). On November 1, 2010, the Marshal filed a
27 return of service as to Defendants Giurbino, Zinna and Moreno. (ECF Nos. 12-14).

28 On November 8, 2010, all Defendants filed the Motion to Dismiss the First Amended

1 Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). (ECF No. 15).

2 On November 19, 2010, Plaintiff filed the Motion for Leave to Amend the First
3 Amended Complaint and attached a proposed Second Amended Complaint. (ECF No. 16).

4 The docket reflects that Defendants have not filed an opposition to the Motion for
5 Leave to Amend.

6 DISCUSSION

7 Federal Rule of Civil Procedure 15 mandates that leave to amend “be freely given when
8 justice so requires.” Fed. R. Civ. P. 15(a). “This policy is to be applied with extreme
9 liberality.” *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th Cir. 2003)
10 (quotation omitted). In *Foman v. Davis*, 371 U.S. 178 (1962), the Supreme Court offered
11 several factors for district courts to consider in deciding whether to grant a motion to amend
12 under Rule 15(a):

13 In the absence of any apparent or declared reason—such as undue delay, bad faith
14 or dilatory motive on the part of the movant, repeated failure to cure deficiencies
15 by amendments previously allowed, undue prejudice to the opposing party by
virtue of allowance of the amendment, futility of amendment, etc.—the leave
sought should, as the rules require, be ‘freely given.’

16 *Foman*, 371 U.S. at 182. “Absent prejudice, or a strong showing of any of the remaining
17 *Foman* factors, there exists a *presumption* under Rule 15(a) in favor of granting leave to
18 amend.” *Eminence Capital*, 316 F.3d at 1052.

19 Defendants have not opposed the Motion for Leave to Amend. After review of the
20 motion, the proposed Second Amended Complaint, and the record, the Court finds that the
21 Motion for Leave to Amend should be granted pursuant to Federal Rule of Civil Procedure
22 15(a). The Clerk of the Court is directed to file the proposed Second Amended Complaint as
23 a separate docket entry, and the Second Amended Complaint will be the operative pleading
24 in this action.

25 Once filed, an amended complaint supersedes the preceeding complaint in its entirety.
26 *See Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1474 (9th Cir. 1997). Defendants’ Motion to
27 Dismiss, addressing the First Amended Complaint, will become moot once the Second
28 Amended Complaint is filed.

CONCLUSION

IT IS HEREBY ORDERED that the Motion for Leave to Amend the First Amended Complaint is GRANTED. (ECF No. 16). The Clerk of the Court shall file the proposed Second Amended Complaint attached to the Motion for Leave to Amend (ECF No. 16-1) as a separate docket entry, and the Second Amended Complaint will be the operative pleading in this action.

IT IS FURTHER ORDERED that the Motion to Dismiss First Amended Complaint is DENIED as moot. (ECF No. 15).

DATED: December 16, 2010


WILLIAM Q. HAYES
United States District Judge